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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY SPEECH,

Defendant and Appellant.

2d Crim. No. B162672  
(Super. Ct. No. NA052804-01)  
(Los Angeles County)

Gregory Speech appeals a judgment after conviction of first degree robbery with a finding that the victim is disabled. (Pen. Code, §§ 211, 667.9, subd. (a) [enhancement where victim is disabled].)<sup>1</sup> We affirm.

FACTS

Priscilla Martinez is a paraplegic confined to a wheelchair. In the late afternoon of April 6, 2002, she returned to her apartment on East 4th Street in Long Beach. Martinez saw Speech, a casual acquaintance, and the two conversed. She offered to show Speech her recently rented apartment.

Speech entered Martinez's apartment and offered to dispose of the trash. They then left the apartment together. As they proceeded along the street, Speech

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<sup>1</sup> All statutory references are to the Penal Code.

remarked that he left his hat inside the apartment. Martinez agreed to return to the apartment to allow Speech to retrieve his hat.

Inside the apartment building elevator, Martinez "felt like something was going to happen." Nevertheless, she returned to the apartment with Speech. Inside, Speech leaned into her left shoulder with his right elbow and forearm and asked, "Where is the money?" Martinez became "very concerned [and] upset" and feared that Speech might "get rough" with her. Speech then reached inside Martinez's shirt pockets and took approximately \$68. In doing so, he tore one pocket and also ruptured Martinez's colostomy pouch. Martinez cried for assistance and Speech fled.

A neighbor summoned police officers. Long Beach Police Officer Dave Schillig interviewed Martinez. She informed him that Speech placed his forearm against her neck and shoulder, ruptured her colostomy pouch, and took money from her shirt pockets.

Several weeks later, Speech approached Martinez and inquired if she intended to "press charges" against him. Speech informed her that he had "a couple of strikes" and another conviction would "strike [him] out."

On May 28, 2002, Long Beach Police Detective Jacinto Ponce saw Speech on the street. Speech attempted to evade Ponce by entering a nearby residence. Ponce arrested him at gunpoint.

During a later interview, Speech stated that he took \$20 from Martinez to purchase rock cocaine for her. After smoking the cocaine, Martinez requested him to purchase more. Speech did and they smoked it. He asked Martinez for more money but she refused. Speech informed Ponce that Martinez "willingly gave him" money.

After Detective Ponce testified at trial concerning Speech's statements, the prosecutor offered evidence that Speech suffered two prior theft-related felony convictions. The prosecutor relied upon *People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1446, which concludes that evidence of a defendant's prior felony conviction is admissible to impeach the credibility of his exculpatory out-of-court statement. Over

defense objection, the trial court permitted the evidence "for the purpose of assessing the credibility of the defendant's statement to the police." The parties then stipulated that Speech suffered two theft-related felony convictions and the trial court instructed regarding the limited purpose of the evidence.

At trial, Martinez denied that she used cocaine with Speech or that she gave him money to purchase cocaine. She testified that she had not used cocaine for two years.

The jury convicted Speech of first degree robbery and found that the victim is a paraplegic. (§§ 211, 667.9, subd. (a).) The trial court then found that Speech suffered nine serious felony convictions pursuant to the Three Strikes law, three serious felony convictions pursuant to section 667, subdivision (a), and that he served three prior prison terms pursuant to section 667.5, subdivision (b). The trial court sentenced Speech to a prison term of 41 years to life.

Speech appeals and contends that: 1) the trial court erred by denying his motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 and *Faretta v. California* (1975) 422 U.S. 806, and 2) the trial court erred by permitting evidence of prior theft convictions to impeach his out-of-court statements.

## DISCUSSION

### I.

#### *Marsden motion*

After conclusion of the jury trial and prior to the court trial regarding the allegations of prior felony convictions, Speech personally sought to file motions for a new trial, to set aside the information, for discovery, and to dismiss prior felony convictions, among others. Speech stated that his attorney did not obtain the testimony of "a necessary witness at trial." Speech's attorney responded that he did not join in the motions. The trial court commented that "most of [the] motions are untimely" and stated that defense counsel represented Speech and counsel would

"decide which motions to file or not." Defense counsel already had filed a motion to dismiss prior felony convictions and later, a motion for a new trial.

Speech argues that the trial court erred by denying this implicit motion pursuant to *People v. Marsden, supra*, 2 Cal.3d 118, without inquiring into Speech's claim of ineffective representation. (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1665-1666 ["When a defendant requests new counsel, the court must allow the defendant to relate specific instances of counsel's conduct to support the claim of counsel's incompetence or lack of diligence."].) He points out that the trial court denied his earlier *Marsden* motion after conducting a hearing.

The trial court must inquire pursuant to *People v. Marsden, supra*, 2 Cal.3d 118, if a defendant asserts directly or indirectly that his counsel's performance is inadequate and denies him the constitutional right to effective counsel. (*People v. Lara* (2001) 86 Cal.App.4th 139, 151.) The trial court is not obliged to initiate a *Marsden* inquiry sua sponte. (*Id.*, at p. 150.) Defendant must request that counsel be removed and new counsel appointed, or else assert that a fundamental breakdown in the attorney-client relationship has occurred. (*People v. Padilla* (1995) 11 Cal.4th 891, 927, disapproved on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) "[A] trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel. . . . The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a *Marsden* hearing." (*People v. Padilla, supra*, 11 Cal.4th 891, 927.)

The trial court was not required to conduct a *Marsden* hearing because Speech did not request, directly or indirectly, that counsel be removed nor did he suggest a breakdown in the attorney-client relationship. (*People v. Padilla, supra*, 11 Cal.4th 891, 927.) At best, Speech and his attorney may have disagreed concerning trial tactics. The trial court is not required to make a *Marsden* inquiry, however, where

defendant and his attorney disagree regarding trial tactics. (*Ibid.*) "[A]t most, [Speech's motions] reflect a difference of opinion over trial tactics and some generalized complaints regarding counsel's performance, rather than a request for new counsel based on specific facts showing a deterioration of the attorney-client relationship." (*People v. Nakahara* (2003) 30 Cal.4th 705, 719.)

*Faretta motions*

Prior to trial, Speech completed and filed a four-page petition to represent himself. The trial court stated that the petition "most likely will be granted" but counseled Speech that it was "unwise" and "not a good idea." Speech responded that he was "very frightened and confused" and knew that he "need[ed] an attorney." He also requested that the trial court appoint co-counsel to assist him. The trial court denied the request for co-counsel, stating that Speech would "do it [himself] the hard way." The trial court then inquired if Speech wanted "to think about it and talk to [his attorney] some more" and return to court in an hour. Speech responded "Yes." Later that day, Speech's attorney informed the trial court that "[w]e'll keep the status quo with Mr. Speech and keep it on calendar."

Speech asserts that the trial court erred by denying his constitutional right to represent himself. He points out that denial of a defendant's timely motion to represent himself is reversible error. (*People v. Dent* (2003) 30 Cal.4th 213, 217 [standard of review].)

A defendant who knowingly and intelligently waives the right to counsel has a constitutional right under the Sixth Amendment to conduct his own defense. (*Faretta v. California, supra*, 422 U.S. 806, 835-836; *People v. Jenkins* (2000) 22 Cal.4th 900, 959.) To invoke this right, defendant must make an unequivocal assertion within a reasonable time prior to trial. (*People v. Jenkins, supra*, 22 Cal.4th 900, 959.) The right of self-representation is waived unless defendant "articulately and unmistakably" demands to proceed pro se. (*People v. Dent, supra*, 30 Cal.4th 213, 218.) The trial court must draw every reasonable inference against waiver of the right

to counsel. (*Ibid.*) In determining whether defendant invoked the right to self-representation, we review the record independently. (*Ibid.*) We examine defendant's invocation as well as his conduct or words reflecting ambivalence. (*People v. Marshall* (1997) 15 Cal.4th 1, 23.)

Here the trial court was not required to grant defendant's right to self-representation because he did not unequivocally assert the right. Speech's request was part of a *Marsden* motion expressing dissatisfaction with his attorney. Speech stated that he was "very frightened and confused" and knew that he "need[ed] an attorney." The trial court indicated that it would "most likely" grant Speech's request for self-representation. It invited Speech, however, to confer with his attorney – an invitation that Speech accepted. Later that day, Speech's counsel informed the trial court that Speech would "keep the status quo." The trial court then prepared a minute order indicating that Speech withdrew his *Faretta* motion. Speech's words and conduct do not establish an unequivocal assertion of his right to self-representation.

After conclusion of trial and prior to trial on the prior felony convictions, Speech personally sought to file motions and requested to "exercise [his] *Faretta* rights at this time." The trial court denied the request as "too late."

Speech contends the trial court abused its discretion by denying this mid-trial *Faretta* motion simply because it was untimely. He points out that the court must consider many factors in the exercise of its discretion. (*People v. Dent, supra*, 30 Cal.4th 213, 221; *People v. Jenkins, supra*, 22 Cal.4th 900, 959 [listing factors trial court should consider in exercising discretion].)

Assuming but not deciding the trial court erred, Speech cannot establish prejudice pursuant to *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594-595 [standard of review of untimely *Faretta* motion].) The trial court found the existence of all but one prior felony conviction based upon prison records and the testimony of a fingerprint expert. Speech's attorney filed a motion to dismiss prior felony convictions and a motion for

new trial based upon insufficiency of the evidence. Although Speech complained that his attorney had not obtained the trial presence of "a necessary witness," his attorney informed the court in the earlier *Marsden* motion that the defense investigator "spoke to over a dozen different people [in the apartment building and] none of them had any information [concerning the alleged robbery]." Speech could not have obtained a more favorable result had he waived his right to counsel.

## II.

At trial, the prosecutor elicited testimony from Detective Ponce that Speech admitted being in Martinez's apartment on April 6, 2002, he "took" \$20 from her, and he spent the money on rock cocaine and cigarettes. On cross-examination, defense counsel elicited the remainder of Speech's interview. These interview statements were exculpatory and indicated that Martinez gave Speech money to purchase rock cocaine. She refused to give him additional money, however, and argued with him.

Thereafter, pursuant to *People v. Jacobs, supra*, 78 Cal.App.4th 1444, 1454, the trial court permitted evidence that Speech suffered "two felony, theft-related convictions." The trial court immediately instructed that the convictions "may be considered . . . only for the purpose of assessing the credibility of [Speech's] statement to the police."

Speech argues that the trial court erred by permitting the prosecutor to impeach his exculpatory out-of-court statements with evidence that he suffered two prior theft-related convictions. He contends that *People v. Jacobs, supra*, 78 Cal.App.4th 1444, is decided incorrectly and is distinguishable. Speech asserts that the prosecutor selected only a portion of his police interview and presented it out of context. He argues that the prosecutor committed misconduct and the error is prejudicial pursuant to *Chapman v. California* (1967) 386 U.S. 18, 24.

In *People v. Jacobs, supra*, 78 Cal.App.4th 1444, a co-defendant in a receiving stolen property prosecution presented defendant's out-of-court admission that

he owned the vehicle in which stolen property was found. Defendant then presented evidence of the remainder of his statement, which was exculpatory. Afterwards, the trial court permitted the prosecutor to impeach defendant's credibility with evidence of two prior theft-related felony convictions. *Jacobs* concluded that impeachment is proper where the defendant is "the proponent of his own statement." (*Id.*, at p. 1454.) "[A] defendant's prior felony convictions are admissible . . . to attack his credibility when, at his own request, his exculpatory statement to the police is admitted into evidence, but he does not testify at trial." (*Id.*, at p. 1446.)

For several reasons, we reject Speech's contention.

First, Speech has waived any claim that the prosecutor committed misconduct because he did not object on this ground in the trial court. (*People v. Ayala* (2000) 23 Cal.4th 225, 284.) Waiver aside, the prosecutor did not commit misconduct. Prosecutorial misconduct involves use of deceptive or reprehensible methods to persuade the jury or acts so egregious as to create an unfair trial. (*People v. Hill, supra*, 17 Cal.4th 800, 819 [misconduct violating state constitution]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214 [misconduct violating federal constitution].) The prosecutor here relied upon a recent judicial decision that concerned similar factual circumstances.

Second, we need not decide if *People v. Jacobs, supra*, 78 Cal.App.4th 1444, is correct because any error in permitting evidence that Speech suffered two prior theft-related felony convictions is harmless under any standard of review. Martinez testified that Speech approached her after the incident and "mentioned [that] he had strikes." "[Speech] said he had a couple of strikes [and] he don't [sic] need three strikes." Long Beach Detective John Mercado also testified that Martinez informed him that Speech stated: "I have two strikes and this one will strike me out." Evidence of the two theft-related felony convictions is cumulative. Moreover, the trial court instructed that the prior felony convictions related "only [to] assessing the credibility of defendant's statement to the police." We presume that jurors follow the



instructions given. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.) Speech has not established prejudice.

The judgment is affirmed.

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GILBERT, J.

We concur:

YEGAN, P.J.

PERREN, J.

William R. Weisman, Judge  
Superior Court County of Los Angeles

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